

U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



DATE: FEB 21 1989
CASE NO. 88-INA-62

IN THE MATTER OF

FLEMAH INC.,
Employer

on behalf of

GEORGE H. ILODI,
Alien

Bernard Mosesson, Esq.
Cleveland, OH
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;
and Brenner, DeGregorio, Tureck, Guill and Schoenfeld,
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Wellington C. Howard's denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States

¹ All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case and Discussion

On July 8, 1986, Employer filed an application for alien labor certification on behalf of George H. Ilodi to fill the position of Podiatrist. Employer listed the duties of the job as follows:

To treat all diseases of the feet, including, but not limited to, surgery, x-rays, prescribe necessary medication, physical therapy treatments; to conduct research, laser surgery. To conduct research to prepare articles for publication in Podiatric Medical Journals

(AF 40). Employer stated on its application that the minimum requirements needed to perform these job duties are: a D.P.M. degree, podiatric medicine and surgery field of study, Ohio State License in Podiatry; Diplomate status in Podiatry; and three publications in scientific journals in the area of podiatric medicine and surgery (id.).

The Certifying Officer ("CO") issued a Notice of Findings ("NOF") (AF 26-29) on August 17, 1987 in which he determined, inter alia, that the requirement of the publication of three articles in scientific journals was unduly restrictive, noting that one of the applicants had published two articles. The CO also stated that this applicant was rejected for other than a lawful, job-related reason, apparently referring to Employer's statement that the applicant expressed reservations about the percentage of Medicaid patients Employer treated.

In rebuttal, Employer submitted a letter dated September 11, 1987,² sworn statements dated September 14 and 15, 1987, and a brief (AF 55-71). Employer argued in its brief that requiring three publications is not unduly restrictive because "as noted in the job description, a

² Employer's September 11, 1987 rebuttal letter refers to a copy of a letter from Employer to the applicant which allegedly was sent to the Employment and Training Administration (see AF 56). That letter is not part of the Appeal File. Since that letter may be relevant, the CO should make sure that, if it is in ETA's files, it is included in the record of this case.

significant part of the job entails the conducting of research and the preparation of articles for publication." (AF 63) Employer further argued that three publications establish a "track record" (AF 66). Moreover, Employer pointed out that the applicant's resume discloses that he has not published any articles. Of the two articles listed on his resume, one allegedly had been accepted for publication, although no date of publication is disclosed; and the other merely states "publication pending." (See AF 63)

In addition, Employer argued that the applicant's reservations about Employer's clientele "gave rise to the determination that he is not likely disposed to the work environment offered" (AF 64) Employer also suggested racial motivations on the applicant's part which would make him unsuitable for the job (see AF 57-58).

The CO issued a Final Determination denying certification on October 27, 1987 (AF 2-4). Despite the fact that the CO discussed the requirement of three publications in scientific journals in the NOF, alleging it to be excessive, he stated in the Final Determination that this requirement was not listed on the Form ETA 750-A -- the job application for certification (see AF 4). The CO also stated that Employer did not respond to his request "to justify the requirement of three published papers instead of two." (Id.) However, neither of these statements is accurate. As noted above, the three publications requirement was contained in the application for certification; and Employer did address in rebuttal the requirement of the number of published papers needed (by arguing the the applicant did not even have two published papers). This part of the Final Determination is clearly inexplicable, and cannot support a denial of certification.

Accordingly, this case must be remanded to the Certifying Officer, so that he may make a proper determination regarding whether the requirement of three published articles is justified by business necessity. In making this determination, it should be pointed out that, in Information Industries, Inc., 88-INA-82 (Feb. 9, 1989) (en banc), the Board held that, to establish business necessity for particular job requirements under §656.21(b)(2)(i),

an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

(Id., slip op. at 9) This standard should be applied to this case on remand, to determine if Employer's publication requirement arises from business necessity.

The CO should also clearly spell out any other grounds for denying certification. For example, if the CO finds that Employer's rejection of the applicant because of his alleged reservations about the nature of Employer's clientele is not a rejection for a lawful, job-related reason under §656.21(b)(7), he should so state in a clear and unambiguous manner.

One final point needs to be raised. The Notice of Findings and the Final Determination must be made clearer. It is not enough merely to list all of the sections of the regulations which may be applicable to the CO's decision. Rather, it is incumbent upon the CO to identify which

sections or subsections of the regulations allegedly have been violated and state with specificity how the Employer violated that section or subsection. It is vital both for Employers and the Board to understand the specific violation being alleged; and neither the NOF nor the Final Determination were adequate in this regard.

Accordingly, the CO's Final Determination is vacated, and the case is remanded for further proceedings consistent with this decision.

ORDER

The Final Determination denying certification is vacated, and the case is remanded to the C.O.

JEFFREY TURECK
Administrative Law Judge

JT:jb